

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JOHN BRYANT, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

MUTUAL OF OMAHA INSURANCE
COMPANY,

Defendant.

Case No. 1:22-CV-1397

**CLASS ACTION
COMPLAINT**

DEMAND FOR JURY TRIAL

Plaintiff John Bryant (“Plaintiff”) by his undersigned counsel, for this class action complaint against Mutual of Omaha Insurance Company, and its present, former, or future direct and indirect parent companies, subsidiaries, affiliates, agents, and/or other related entities (“Mutual of Omaha” or “Defendant”), alleges as follows:

I. INTRODUCTION

1. Nature of Action. Plaintiff, individually and as class representative for all others similarly situated, brings this action against Mutual of Omaha for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”). Mutual of Omaha engaged in automated telemarketing in violation of the TCPA using pre-recorded messages that were sent to cellular telephones.

2. Mr. Bryant also alleges that Mutual of Omaha's agent made unsolicited telemarketing calls to Virginia telephone numbers on the National Do Not Call Registry, and that by doing so, Mutual of Omaha has violated the provisions of the Virginia Telephone Privacy Protection Act, Va. Stat. § 59.1-510 *et seq.* ("VTPPA").

3. Because telemarketing campaigns generally place calls to hundreds of thousands or even millions of potential customers *en masse*, Plaintiff brings this action on behalf of a proposed nationwide class of other persons who received illegal telemarketing calls from or on behalf of Defendant.

II. PARTIES

4. Plaintiff John Bryant is an individual residing in Virginia in this District.

5. Defendant Mutual of Omaha Insurance Company is a Nebraska company with its principal place of business in Nebraska.

6. Defendant engages in telemarketing into this District, as it did with the Plaintiff.

III. JURISDICTION AND VENUE

7. Jurisdiction. This Court has subject matter jurisdiction over Plaintiff's TCPA claim pursuant to 28 U.S.C. § 1331 because Plaintiff's TCPA claim arise under the laws of the United States, specifically, 47 U.S.C. § 227.

1 8. Personal Jurisdiction. This Court has personal jurisdiction over
2 Mutual of Omaha because it sells insurance in Virginia, and this action arises from
3 calls into Virginia to sell insurance.
4

5 9. Venue. Venue is proper in this District pursuant to 28 U.S.C. §
6 1391(b) because a substantial part of the events giving rise to Plaintiff's claims
7 occurred in this District.
8

9 **IV.BACKGROUND**

10 10. In 1991, Congress enacted the TCPA in response to a growing number
11 of consumer complaints regarding certain telemarketing practices.
12

13 11. The TCPA makes it unlawful “to make any call (other than a call
14 made for emergency purposes or made with the prior express consent of the called
15 party) using an automatic telephone dialing system or an artificial or prerecorded
16 voice ... to any telephone number assigned to a ... cellular telephone service.” 47
17 U.S.C. § 227(b)(1)(A)(iii). The TCPA provides a private cause of action to
18 persons who receive calls in violation of Section 227(b)(1)(A). 47 U.S.C. §
19 227(b)(3).
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22 12. According to findings by the Federal Communication Commission
23 (“FCC”), the agency Congress vested with authority to issue regulations
24 implementing the TCPA, such calls are prohibited because, as Congress found,
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1 automated or prerecorded telephone calls are a greater nuisance and invasion of
2 privacy than live solicitation calls, and such calls can be costly and inconvenient.

3 13. The FCC also recognized that “wireless customers are charged for
4 incoming calls whether they pay in advance or after the minutes are used.” *In re*
5 *Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG
6 Docket No. 02-278, Report and Order, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003).
7
8

9 14. In 2013, the FCC required prior express written consent for all
10 autodialed or prerecorded telemarketing calls (“robocalls”) to wireless numbers
11 and residential lines. Specifically, it ordered:
12

13 [A] consumer’s written consent to receive telemarketing robocalls
14 must be signed and be sufficient to show that the consumer: (1)
15 received “clear and conspicuous disclosure” of the consequences of
16 providing the requested consent, i.e., that the consumer will receive
17 future calls that deliver prerecorded messages by or on behalf of a
18 specific seller; and (2) having received this information, agrees
19 unambiguously to receive such calls at a telephone number the
20 consumer designates. In addition, the written agreement must be
21 obtained “without requiring, directly or indirectly, that the agreement
22 be executed as a condition of purchasing any good or service.”
23 *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of*
24 *1991*, 27 FCC Rcd. 1830, 1844 ¶ 33 (2012) (footnote omitted).
25
26

27 15. Virginia has also passed the Virginia Telephone Privacy Protection
28 Act, Va. Stat. § 59.1-510 *et seq.* (“VTPPA”) to protect its consumers from
unwanted telemarketing.

1 16. It is a violation of the VTPPA to “initiate, or cause to be initiated, a
2 telephone solicitation call to a telephone number on the National Do Not Call
3 Registry” Va. Stat. § 59.1-514(B).
4

5 **V. FACTUAL ALLEGATIONS**

6 17. Mutual of Omaha offers insurance policies to consumers through its
7 network of agents.
8

9 18. One of Mutual of Omaha’s strategies for marketing Mutual of
10 Omaha’s insurance policies and generating new customers is telemarketing done
11 by third parties.
12

13 19. This telemarketing includes the use of pre-recorded messages to
14 generate new business for Mutual of Omaha.
15

16 20. Recipients of these calls, including Plaintiff, did not consent to receive
17 such telephone calls.
18

19 21. Plaintiff is, and at all times mentioned herein was, a “person” as
20 defined by 47 U.S.C. § 153(39).
21
22
23

24 **Calls to Plaintiff Bryant**

25 22. Plaintiff Bryant’s telephone number, (757-XXX-0212, is registered to
26 a cellular telephone service.
27

1 23. That same number is also registered on the National Do Not Call
2 Registry and has been for more than 30 days prior to receipt of the calls at issue in
3 this lawsuit.

4
5 24. On August 31, 2022, the Plaintiff received pre-recorded calls from
6 Mutual of Omaha's telemarketer.

7
8 25. The call was received from a spoofed Virginia area code telephone
9 number that could not be called back to make a request to not be called again.

10 26. During the call, an interactive recorded message played, starting with
11 "Hi there. This is Jackie. Are you doing okay today?".

12
13 27. The pre-recorded message continued with, "I am a Medicare benefits
14 liaison with Senior Life. According to our records, it looks like you may be eligible
15 for information about ways to reduce or potentially eliminate the costs that
16 Medicare doesn't cover."

17
18 28. The pre-recorded voice continued, "Part of my job is to inform
19 Medicare customers and their families, that final expenses and funeral costs can be
20 around 10 or \$20,000. That's why it's critical to have a plan in place in order to
21 protect your family from having to pay these expenses."

22
23 29. The dialog, cadence, and voice inflections of "Jackie" during each of
24 the statements was identical, evidencing a prerecorded voice.
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1 30. During the call, the Plaintiff was successfully transferred to a licensed
2 insurance agent.

3 31. Immediately after the transfer, a message was playing stating: “Thank
4 you for calling Mutual of Omaha, your call will be recorded.”
5

6 32. The licensed insurance agent then joined the call and identified as
7 “Burt Smith with Mutual of Omaha”.
8

9 33. Mr. Smith attempted to solicit Plaintiff’s purchase of an insurance
10 policy from Mutual of Omaha.

11 34. Mr. Smith provided the telephone number 800-775-6000 as a call
12 back number.
13

14 35. That is a number for Mutual of Omaha.

15 36. Mr. Bryant was not interested and ended the call.
16

17 37. Prior to the filing of this lawsuit, Mr. Bryant sent a letter to Mutual of
18 Omaha regarding the pre-recorded call.

19 38. He did not receive a response.
20

21 39. The Plaintiff did not provide his prior express written consent to
22 Defendant to receive the calls.
23

24 40. Plaintiff and all members of the Class, defined below, have been
25 harmed by the acts of Defendant because their privacy has been violated, they were
26 annoyed and harassed, and, in some instances, they were charged for incoming
27

calls. The calls occupied their cellular telephone lines, rendering them unavailable for legitimate communication.

VI. MUTUAL OF OMAHA'S LIABILITY

41. For twenty-five years the FCC has explained that its “rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations.” *In re Rules & Regulations Implementing the TCPA*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12397 (¶ 13) (1995).

42. On May 9, 2013, the FCC released a Declaratory Ruling holding that a corporation or other entity that contracts out its telephone marketing “may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers.”¹

43. In that ruling, the FCC instructed that sellers such as Mutual of Omaha may not avoid liability by outsourcing telemarketing:

[A]llowing the seller to avoid potential liability by outsourcing its telemarketing activities to unsupervised third parties would leave consumers in many cases without an effective remedy for telemarketing intrusions. This would particularly be so if the telemarketers were judgment proof, unidentifiable, or located outside the United States, as is often the case. Even where third-party telemarketers are identifiable, solvent, and amenable to judgment limiting liability to the telemarketer

¹ *In re Joint Petition Filed by DISH Network, LLC et al. for Declaratory Ruling Concerning the TCPA Rules*, 28 FCC Rcd 6574, 6574 (¶ 1) (2013) (“May 2013 FCC Ruling”).

1 that physically places the call would make enforcement in many cases
2 substantially more expensive and less efficient, since consumers (or law
3 enforcement agencies) would be required to sue each marketer
4 separately in order to obtain effective relief. As the FTC noted, because
5 “[s]ellers may have thousands of ‘independent’ marketers, suing one or
a few of them is unlikely to make a substantive difference for consumer
privacy.”

6 *May 2013 FCC Ruling*, 28 FCC Rcd at 6588 (¶ 37) (internal citations omitted).

7
8 44. The telemarketer was required to promote Mutual of Omaha’s
9 products on their telemarketing calls in order to potentially generate new
10 customers, and did so, as they did with the Plaintiff.

11
12 45. During this time, Mutual of Omaha was knowingly and actively
13 accepting the business that originated through the illegal telemarketing calls
14 through the issuance of insurance policies.

15
16 46. Mutual of Omaha derived a benefit from the telemarketer’s interaction
17 with the Plaintiff by the attempted issuance of a policy.

18
19 47. Moreover, Mutual of Omaha maintained interim control over the
20 telemarketer’s actions.

21
22 48. For example, Mutual of Omaha had ability to prohibit it from using
23 pre-recorded methodology to contact potential customers.

24
25 49. Mutual of Omaha failed to make such an instruction to the
26 telemarketer, and as a result, is liable for the telemarketer’s conduct.

1 50. Mutual of Omaha also gave interim instructions to the telemarketer by
2 providing the volume of calling and leads it would purchase.

3 51. Mutual of Omaha gave further interim instructions to the telemarketer
4 by providing the states that those companies were allowed to make calls into and
5 restricting other states that they could not.

6 52. Indeed, Mr. Bryant has previously been told by Mutual of Omaha that
7 they hired third parties that engage in cold calling.

8 53. Finally, the May 2013 FCC Ruling states that called parties may
9 obtain “evidence of these kinds of relationships . . . through discovery, if they are
10 not independently privy to such information.” *Id.* at 6592-593 (¶ 46). Evidence of
11 circumstances pointing to apparent authority on behalf of the telemarketer “should
12 be sufficient to place upon the seller the burden of demonstrating that a reasonable
13 consumer would not sensibly assume that the telemarketer was acting as the
14 seller’s authorized agent.” *Id.* at 6593 (¶ 46).

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22 **VII. CLASS ACTION ALLEGATIONS**

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24 54. Class Definition. Pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3),
25 Plaintiff brings this case on behalf of Class (the “Classes”) defined as follows:
26

TCPA Pre-Record Class: All persons to whom: (a) Mutual of Omaha and/or a third party acting on Mutual of Omaha's behalf made one or more non-emergency telephone calls; (b) to their cellular telephone numbers; (c) through the use of an artificial or prerecorded voice; (d) for the purpose of promoting Mutual of Omaha's products; (e) at any time in the last four years through the date of trial.

Virginia Telephone Privacy Protection Act Do Not Call Registry Class:

All persons in Virginia or with a Virginia area code, who, (1) received a telephonic sales call from Mutual of Omaha and/or a third party acting on Mutual of Omaha's behalf regarding goods or services, (2) to a number on the National Do Not Call Registry (3) from the four years prior to the filing of the complaint through the date of trial.

Virginia Telephone Privacy Protection Act Failure to Identify Class:

All persons in Virginia or with a Virginia area code, who, (1) received a telephonic sales call from Mutual of Omaha and/or a third party acting on Mutual of Omaha's behalf regarding Mutual of Omaha's goods or services, (2) during which the caller failed to promptly identify themselves by first and last names and/or failed to promptly identify the Defendant as the persons on whose behalf the telephone solicitation was being made (3) from the four years prior to the filing of the complaint through the date of trial.

Virginia Telephone Privacy Protection Act Caller Identification Class:

All persons in Virginia or with a Virginia area code, who, (1) received a telephonic sales call from Mutual of Omaha and/or a third party acting on Mutual of Omaha's behalf regarding Mutual of Omaha's goods or services, (2) that did not include the transmission of the name of the caller or from a number that did not permit, if called back during regular business hours, an individual to make a request not to receive telephone solicitation calls (3) from the four years prior to the filing of the complaint through the date of trial.

55. Numerosity. The Classes are so numerous that joinder of all its members is impracticable. On information and belief and on the basis of the *en masse* calling practices at issue, the Classes have at least hundreds of members.

1 56. Commonality. There are numerous questions of law and fact common
2 to Plaintiff and members of the Classes. These common questions of law and fact
3 include, but are not limited to, the following:

- 4
- 5 a. Whether the Defendant used a prerecorded voice;
- 6 b. Whether the Defendant purchased batches of leads of prospects
7 who had not consented to be called by it;
- 8 c. Whether Mutual of Omaha is vicariously liable for the
9 telemarketer's acts; and
- 10 d. Whether Mutual of Omaha's conduct was willful or knowing
11 such that damages should be trebled.
- 12
- 13

14 57. Typicality. Plaintiff's claims are typical of the claims of the Classes.
15 Plaintiff's claims and those of the Classes arise out of the same course of conduct
16 by Defendant and are based on the same legal and remedial theories.

17

18 58. Adequacy. Plaintiff will fairly and adequately protect the interests of
19 the Classes. Plaintiff has retained competent and capable counsel with experience
20 in TCPA and consumer class action litigation. Plaintiff and his counsel are
21 committed to prosecuting this action vigorously on behalf of the Classes and have
22 the financial resources to do so. Neither Plaintiff nor his counsel has interests
23 contrary to or conflicting with those of the proposed Classes.

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1 59. Predominance. Defendant has engaged in a common course of
2 conduct toward Plaintiff and members of the Classes. The common issues arising
3 from this conduct that affect Plaintiff and members of the Classes predominate
4 over any individual issues. For example, the TCPA's statutory damages obviate
5 the need for mini-trials on actual damages. Adjudication of these common issues in
6 a single action has important and desirable advantages, including judicial
7 economy.
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10 60. Superiority. A class action is the superior method for the fair and
11 efficient adjudication of this controversy. Classwide relief is essential to compel
12 Defendant to comply with the TCPA. The interest of individual members of the
13 Classes in individually controlling the prosecution of separate claims against
14 Defendant is small because the damages in an individual action for violation of the
15 TCPA are small. Management of these claims is likely to present significantly
16 fewer difficulties than are presented in many class actions because the calls at issue
17 are all automated and because the TCPA articulates bright-line standards for
18 liability and damages.
19

20
21 61. Injunctive and Declaratory Relief is Appropriate. Defendant has acted
22 on grounds generally applicable to the Classes, thereby making final injunctive
23 relief and corresponding declaratory relief with respect to the Classes appropriate
24 on a classwide basis.
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26

VIII. FIRST CLAIM FOR RELIEF
(Violations of the Telephone Consumer Protection Act, 47 U.S.C. §
227(b)(1)(A))

62. Plaintiff realleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

63. The foregoing acts and omissions of Defendant and agent constitute numerous and multiple violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by making non-emergency calls to the cellular telephone numbers of Plaintiff and members of the Class using an artificial or prerecorded voice.

64. As a result of violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by Defendant and its agent, Plaintiff and members of the Class are entitled to an award of \$500 in damages for each and every call made to their cellular telephone numbers using an artificial or prerecorded voice in violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

65. Plaintiff and members of the Class are also entitled to and do seek injunctive relief prohibiting Defendant and its agent from violating the TCPA, 47 U.S.C. § 227(b)(1)(A), by making calls, except for emergency purposes, to any cellular telephone numbers using an artificial or prerecorded voice.

66. As a result of knowing and/or willful violations of the TCPA, 47 U.S.C. § 227(b)(1)(A), by Defendant and its agent Plaintiff and members of the

1 Class are entitled to treble damages of up to \$1,500 for each and every call made to
2 their cellular telephone numbers using an artificial or prerecorded voice in
3 violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).
4

5 **SECOND CLAIM FOR RELIEF**
6 **Violation of the Virginia Telephone Privacy Protection Act,**
7 **Va. Stat. § 59.1-514**
8 **On Behalf of Plaintiff and the Virginia Telephone Privacy Protection**
9 **Act National Do Not Registry Call Class**

10 67. Plaintiff repeats and incorporates the allegations set forth in the prior
11 paragraphs as if fully set forth herein.

12 68. Plaintiff brings this claim individually and on behalf of the Virginia
13 Telephone Privacy Protection Act National Do Not Call Registry Class Members
14 against Defendant.

15 69. It is a violation of the VTPPA to “initiate, or cause to be initiated, a
16 telephone solicitation call to a telephone number on the National Do Not Call
17 Registry” Va. Stat. § 59.1-514(B).
18

19 70. A “telephone solicitation call” is a call made “for the purpose of
20 offering or advertising any property, goods, or services for sale, lease, license, or
21 investment” *Id* at § 59.1-510.
22

23 71. Defendant failed to secure prior express written consent from Plaintiff
24 and the Class Members.
25

1 72. In violation of the VTPPA, Defendant's agent made and/or knowingly
2 allowed telephonic sales calls to be made to Plaintiff and the Class members without
3 Plaintiff's and the Classes members' prior express written consent even though the
4 Class members were on the National Do Not Call Registry.
5

6 73. As a result of Defendant's conduct, and pursuant to § 59.1-515 of the
7 VTPPA, Plaintiff and Classes members were harmed and are each entitled to a
8 minimum of \$500.00 in damages for each violation. Plaintiff and the Classes
9 members are also entitled to an injunction against future calls. *Id.*
10

11 **THIRD CLAIM FOR RELIEF**
12 **Violation of the Virginia Telephone Privacy Protection Act,**
13 **Va. Stat. § 59.1-512**
14 **On Behalf of Plaintiff and the Virginia Telephone Privacy Protection**
15 **Act Failure to Identify Call Class**

16 74. Plaintiff repeats and incorporates the allegations of the prior paragraphs
17 as if fully set forth herein.

18 75. Plaintiff brings this claim individually and on behalf of the Virginia
19 Telephone Privacy Protection Act Failure to Identify Class Members against
20 Defendant.
21

22 76. It is a violation of the VTPPA to make or have made a telephonic
23 sales call during which the caller fails to promptly identify themselves by first and
24 last names and/or fails to promptly identify on whose behalf the telephone
25 solicitation is being made. Va. Stat. § 59.1-512.
26

1 77. A “telephone solicitation call” is a call made “for the purpose of
2 offering or advertising any property, goods, or services for sale, lease, license, or
3 investment” *Id* at § 59.1-510.

4
5 78. Defendant failed to secure prior express written consent from Plaintiff
6 and the Class Members.

7
8 79. In violation of the VTPPA, Defendant’s agent made and/or knowingly
9 allowed telephonic sales calls to be made to Plaintiff and the Classes members
10 without Plaintiff’s and the Classes members’ prior express written consent even
11 though during the calls the caller failed to promptly identify themselves by first
12 and last names and/or failed to promptly identify the Defendant as the persons on
13 whose behalf the telephone solicitations were being made.

14
15 80. As a result of Defendants’ conduct, and pursuant to § 59.1-515 of the
16 VTPPA, Plaintiff and Class members were harmed and are each entitled to a
17 minimum of \$500.00 in damages for each violation. Plaintiff and the Class
18 members are also entitled to an injunction against future calls. *Id*.

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20
21 **FOURTH CLAIM FOR RELIEF**
22 **Violation of the Virginia Telephone Privacy Protection Act,**
23 **Va. Stat. § 59.1-513**
24 **On Behalf of Plaintiff and the Virginia Telephone Privacy Protection**
25 **Act Caller Identification Class**

26 81. Plaintiff repeats and incorporates the allegations of the prior
27 paragraphs as if fully set forth herein.

1 82. Plaintiff brings this claim individually and on behalf of the Virginia
2 Telephone Privacy Protection Act and Caller Identification Class Members against
3 Defendant.

4
5 83. It is a violation of the VTPPA to make or have made telephone
6 solicitation calls that do not include the transmission of the name of the caller
7 and/or from numbers that do not permit, if called back during regular business
8 hours, an individual to make a request not to receive telephone solicitation calls.
9
10 Va. Stat. § 59.1-513.

11 84. A “telephone solicitation call” is a call made “for the purpose of
12 offering or advertising any property, goods, or services for sale, lease, license, or
13 investment” *Id* at § 59.1-510.

14
15 85. Defendant failed to secure prior express written consent from Plaintiff
16 and the Class Members.

17
18 86. In violation of the VTPPA, Defendant’s agent made and/or knowingly
19 allowed telephonic sales calls to be made to Plaintiff and the Classes members
20 without Plaintiff’s and the Class members’ prior express written consent even
21 though the calls did not include the transmission of the name of the caller and/or
22 were made from numbers that did not permit, if called back during regular business
23 hours, an individual to make a request not to receive telephone solicitation calls.
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1 87. As a result of Defendant's conduct, and pursuant to § 59.1-515 of the
2 VTPPA, Plaintiff and the Classes members were harmed and are each entitled to a
3 minimum of \$500.00 in damages for each violation. Plaintiff and the Class
4 members are also entitled to an injunction against future calls. *Id.*
5

6
7 **PRAYER FOR RELIEF**

8 **WHEREFORE**, Plaintiff, individually and on behalf of the Classes, prays
9 for the following relief:
10

11 A. Injunctive relief prohibiting Defendant from calling telephone
12 numbers advertising their goods or services, except for emergency purposes, to
13 numbers on the National Do Not Call Registry in the future;
14

15 B. That the Court enter a judgment awarding Plaintiff and all class
16 members statutory damages for each violation of the TCPA and VTPPA; and
17

18 C. An order certifying this action to be a proper class action pursuant to
19 Federal Rule of Civil Procedure 23, establishing appropriate Classes the Court
20 deems appropriate, finding that Plaintiff is a proper representative of the Classes,
21 and appointing the lawyers and law firms representing Plaintiff as counsel for the
22 Classes;
23

24 D. Such other relief as the Court deems just and proper.
25
26

IX. DEMAND FOR JURY

Plaintiff demands a trial by jury for all issues so triable.

Dated: December 6, 2022

Respectfully submitted,

/s/ William P. Robinson III

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putative Classes*